

**FILED**

FEB 10 2009

**BEFORE A HEARING OFFICER  
OF THE SUPREME COURT OF ARIZONA**

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY                     

IN THE MATTER OF A MEMBER ) No. 08-1236  
OF THE STATE BAR OF ARIZONA )  
) **HEARING OFFICER'S FINDINGS,**  
) **AND**  
EDWARD C. NESBITT, ) **RECOMMENDATION**  
Bar No. 004473 )  
)  
RESPONDENT )  
\_\_\_\_\_ )

**PROCEDURAL HISTORY**

A Probable Cause Order was issued on September 10, 2008 requesting the issuance of a Complaint against Respondent for violations of Rule 42, Ariz.R.Sup.Ct., including but not limited to ERs 3.2; 3.4(c); 8.1(a) and Rules 53(c), (d) and (f). The Complaint was filed on September 29, 2008, and Respondent's undated Answer subsequent thereto. The parties executed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support thereof on January 9, 2009. The Tender and Agreement was rejected by the Hearing Officer and the matter set for hearing, which occurred on January 21, 2009.

**FINDINGS OF FACT**

1. The Respondent at all relevant times was a lawyer licensed to practice law in the State of Arizona, having been admitted to practice on May 25, 1976.
2. In 2007 Respondent was hired to represent Ernest C. Romero ( "Romero" or

"client") in a state criminal matter, in Pima County Superior Court.

1 3. The state case was dismissed and the same charges, possession of a firearm by a  
2 convicted felon, refiled in the United States District Court in Tucson.

3 4. Romero was convicted and the matter set for sentencing.

4 5. Respondent and Romero did not discuss an appeal.

5 6. At the sentencing the Court advised Mr. Romero of the right to an appeal and the  
6 procedures necessary to initiate an appeal. Mr. Nesbitt was present throughout the  
7 sentencing.  
8

9 7. After the sentencing, (which was for a term of 44 months, as recalled by  
10 Respondent) Mr. Romero asked Respondent to "file an appeal".  
11

12 8. Respondent agreed to do so.

13 9. The Federal Rules require such a notice to be filed within 10 days of the  
14 sentencing.  
15

16 10. Approximately 5 days after the sentencing Respondent attempted to contact Mr.  
17 Romero through the Federal Prison System. He was unable to do so, and believed  
18 that Mr. Romero was possibly still in transit to the federal facility where he was to be  
19 imprisoned.

20 11. Filings in the U.S. District Court are done electronically.

21 12. On October 9, 2007, the 9<sup>th</sup> day after sentencing, Nesbitt filed a Notice of Appeal  
22 in the United States District Court in Tucson, as the Rules required.  
23

24 13. During the electronic procedure he was informed that there was a docketing and  
25

filing fee requirement of \$455.00.

14. At that time Respondent had not been paid the full amount of the original fee agreed to be paid by his client for the District Court trial, and had been paid no money for an appeal.

15. This electronic notification was the first time Respondent was made aware of any docket or filing fee in connection with a criminal appeal in Federal Court.

16. The Romero case was the first (and still the only) case Respondent had tried in a Federal Court. His prior federal court history was limited to a few guilty pleas and extradition hearings.

17. Respondent's entire legal career has been either as a Deputy County Attorney for Pima County or a private practitioner, limiting his practice to criminal cases in state courts.

18. Despite the request for the docketing and filing fee, Respondent was successful in filing the notice of appeal, which was forwarded, through normal processes, to the United States Circuit Court of Appeals for the Ninth Circuit ("9<sup>th</sup> Circuit").

19. On October 22, 2007 Respondent filed an electronic Motion to Withdraw and Counsel for Romero in the District Court, stating that he had "fulfilled his obligations under the terms of his contract with the Defendant". This motion was not sent by Respondent to his client.

20. Apparently no action was taken on this motion by the District Court.

21. The 9<sup>th</sup> Circuit sent a letter, dated October 23, 2007 to Respondent. The letter

contained the docket number of the Romero appeal, and noted that the \$455.00 docket fee was past due. It stated that if the docket fee was not paid within 10 days of the filing of the appeal, "dismissal proceedings will be commenced". The letter also apparently contained information regarding the appellate process, and referred to "Circuit Rules", as well as providing an "appellate processing schedule" and a "case processing checklist to help you monitor the progress of your case".

22. While Respondent admitted receiving the letter and its contents, only the cover letter was provided.

23. Respondent did not answer the letter, or respond in any way. He has to this date made no contact whatsoever with the 9<sup>th</sup> Circuit Court of Appeals.

24. After his initial attempt to contact Mr. Romero as set forth in ¶ 10, above; Respondent has made no attempt to contact Mr. Romero whatsoever.

25. At some time after the sentencing on October 1, 2007, Respondent made some telephonic attempts to contact Mr. Romero's brother and mother. His calls were not returned, and no other attempts were made.

26. On November 30, 2007 the 9<sup>th</sup> Circuit entered an Order, reflecting its October 23 letter, reciting non payments of the docket fee, and ordering Mr. Nesbitt, who is described in the order as "appellant's retained counsel" to "have one final opportunity" to pay the fees within 10 days, "or move this court for leave to proceed on appeal in forma pauperis" in the proper format.

27. The Court then stated: " Alternatively, if counsel is unable to prosecute this

appeal, counsel shall file a motion under Ninth Circuit Rule 4-1(c) within 14 days to  
1 withdraw as counsel”.

2 28. Respondent did nothing in response to this order.

3 29. On July 16, 2008 the 9<sup>th</sup> Circuit entered a further order reflecting an Order  
4 entered on February 26, 2008 in which it ordered Respondent to file a response to its  
5 Order to Show Cause why he should not have monetary sanctions imposed “for  
6 failure to comply with the court’s rules and orders”, and noting a failure to respond  
7 by Respondent.  
8

9 30. Neither the Order to Show Cause nor the February 26 order were provided at the  
10 hearing despite the hearing officer’s request to the State Bar and Respondent that all  
11 federal court orders and entries pertinent to the matter be provided.  
12

13 31. The July 16 order imposed a monetary sanction upon Respondent in the amount  
14 of \$1000.00 and ordered it to be paid within 21 days of July 16.  
15

16 32. Respondent has not paid the sanction to this date.

17 33. Prior to these orders, on May 09, 2008, the 9<sup>th</sup> Circuit entered an order in which  
18 it noted that: “Appellant’s motion for appointment of counsel is also construed as a  
19 motion for leave to proceed in forma pauperis. So construed, the motion is granted”.

20 34. The order does not reflect who filed this motion.

21 35. On May 20, 2008 the Federal Public Defender’s Office in Tucson succeeded to  
22 the position of counsel for Ernesto Romero, obtained Mr. Nesbitt’s files, and  
23 presumably has proceeded with the appeal.  
24

38. The July 16 order of the 9<sup>th</sup> Circuit also referred the matter to the State Bar of Arizona.

39 On September 8, 2008 the 9<sup>th</sup> Circuit entered an order reflecting an earlier order of July 21, 2008, requiring Mr. Nesbitt to provide proof of admission to the bar of the 9<sup>th</sup> Circuit or to complete an application to complete the bar admission form which accompanied the July 21 order. The September 8 order stated that Mr. Nesbitt had not complied with the July 21 order and allowed a further 14 days to comply. Mr. Nesbitt has never shown such proof or filed for admission. The July 21 order was not supplied to the Hearing Officer by either Respondent or the State Bar.

40. On July 24, 2008 Staff Bar Counsel wrote Mr. Nesbitt concerning the information submitted by the 9<sup>th</sup> Circuit, and requested a response. None was provided within the time allowed.

41. On August 19, 2008 a follow up letter to Mr. Nesbitt, noting his failure to reply to the July 24 letter, was sent, requesting a reply in 10 days. No response was made by Respondent.

42. The Probable Cause Order of September 10 was sent to Respondent on September 11.

44. On November 24, 2008 a faxed letter dated November 17 was sent to Bar Counsel by Mr. Nesbitt. This was the first contact he made in response to Bar inquiries, and was received after the Complaint was filed.

45. At the hearing Mr. Nesbitt stated that "he assumed" that the various motions and

orders referenced above had been sent to Mr. Romero, but no proof or documentation supporting that assumption was provided.

45. Mr. Nesbitt stated that he "assumed" that the 9<sup>th</sup> Circuit would not dismiss the appeal without notifying Mr. Romero.

46. He also stated that, apparently with reference to 9<sup>th</sup> Circuit letter of October 23, 2007 [¶ 21, supra] the following:

And I was going back to the part that said if you don't pay, we're going to dismiss the appeal. And from my perspective, that was preferable than having to process the appeal or finding somebody else to process the appeal on Mr. Romero's behalf, and I didn't want to do either of these. (Transcript p. 23 lines 9-14)

47. Respondent also stated that he was very unfamiliar with the Federal Rules specifically and appeals in general, never having done one.

48. Respondent stated that he did initially not pay the \$1000.00 sanction for the primary reason that he did not have the money. He later stated that he felt that he should not do anything "until this process is over and then do whatever I'm ordered to do" (Transcript p. 24 line 22 - p. 25 line 13; p. 65 lines 20-21)

49. Respondent believed that his client would allege ineffective assistance of counsel, i.e. Mr. Nesbitt; as one possible grounds for his appeal.

50. Respondent has never had any prior disciplinary action against him.

## CONCLUSIONS OF LAW

The record in the matter establishes by clear and convincing evidence the following:

1. Respondent violated ERs 1.1 and 1.3 in failing to provide competent representation and failing to act with reasonable diligence and promptness in representing his client. Mr. Nesbitt admitted that he was unfamiliar with Federal Criminal appeals, but, even when offered information by the 9<sup>th</sup> Circuit, failed to do anything to insure that the appeal would be properly prosecuted and that Mr. Romero would not face possible dismissal of the appeal. In the period of time between the conviction and sentencing he had the opportunity to discuss the nature of an appeal with his client, and to review the options. He also had time to familiarize himself with the rules and obligations of an appellate attorney. He simply did nothing but plead ignorance.

Respondent also apparently takes the position that he was not retained to prosecute the appeal. But when his client asked him to "file the appeal" he agreed to do so, and in fact he did. At that point he became counsel of record. As far as his client knew, he was going to handle the appeal of the case. Mr. Romero was Respondent's client until that position was properly changed by agreed withdrawal and/or substitution of counsel under court rules. Respondent did not have the option of simply walking away from the case when a problem arose.

2. Respondent violated ER 3.2 in failing to make reasonable efforts to expedite litigation. Mr. Nesbitt's total failure to follow the orders of the 9<sup>th</sup> Circuit to process the appeal delayed the appeal by approximately 7 months, from the date the 9<sup>th</sup> Circuit received the case, October 23, 2007, until the Federal Public Defender took



over the appeal on May 20, 2008.

1 3. Respondent violated ER 3.4(c) by knowingly disobeying the various orders of  
2 the 9<sup>th</sup> Circuit of October 23, 2007, November 30, 2007, February 26, 2008 and July  
3 21, 2008. Respondent testified that at no time did he ever attempt to communicate in  
4 any way whatsoever with the 9<sup>th</sup> Circuit, despite receipt of these orders. While he  
5 stated that he thought he had been placed in an "unfair" position; he never  
6 communicated with the court over the period from October 23, 2007 to this day.

7  
8 4. Respondent violated Rule 8.1 by failing to respond to a lawful demand for  
9 information from the State Bar. Respondent admitted he did not reply to the letters  
10 from the State Bar dated July 24, 2008 and August 19, 2008, requesting his response  
11 to the correspondence from the 9<sup>th</sup> Circuit concerning his failure to follow its orders.

12  
13 5. Respondent violated Rule 53(c), Ariz.R.Sup.Ct. in that he violated the  
14 aforementioned orders of the United States Court of Appeals for the 9<sup>th</sup> Circuit.

15  
16 6. Respondent violated Rule 53(d), Ariz.R.Sup. Ct. by refusing to cooperate with  
17 officials of the state bar acting in the course of their duties, by not responding to  
18 lawful requests for information.

19 7. Respondent violated Rule 53(f)(1) Ariz.R.Sup.Ct. by failing to provide a full and  
20 complete response to the request of bar counsel for information made pursuant to  
21 Court rules.

22  
23 8. Respondent violated Rule 53(f)(3) by failing to provide copies of all federal court  
24 orders and actions to the hearing officer as requested.

## ABA STANDARDS

1 *Standard 4.4, Lack of Diligence*, covers situations in which a failure to act with  
2 reasonable diligence is involved. Mr. Nesbitt clearly failed to act with reasonable  
3 diligence in pursuing the preservation of Mr. Romero's appeal rights. When his  
4 client asked him to "file an appeal", and he agreed to do so, he undertook the  
5 responsibility to carry that forward. He started the process by filing the notice of  
6 appeal, but when he ran into a problem concerning the docket fee, he simply stopped;  
7 in effect abandoning his client. While he stated that he did not want to actually  
8 continue with the appeal because of the problem created by his client's apparent  
9 desire to use competency of counsel as an issue on appeal; Mr. Nesbitt did not have  
10 the option of abandoning the appellate process on behalf of his client. Any attorney  
11 would know that criminal appeals can, and often are moved forward in forma  
12 pauperis; but Mr. Nesbitt, although he has been engaged in criminal practice for  
13 thirty four years, never attempted to explore that avenue. He stated he was unsure of  
14 his client's financial situation, based solely on the fact that his client had \$4,000.00  
15 in his possession when arrested. But this money would have been returned on his  
16 release from the state charges (unless impounded by legal process), several weeks if  
17 not months before his federal criminal trial. There certainly was no reason why he  
18 could not have contacted Mr. Romero, and provided the necessary information and  
19 affidavit needed. Or, alternatively, he might have obtained the needed fees from his  
20 client if he had the money. At the very least, he should have informed his client of

the requirement, and further informed Mr. Romero that he would not be able to continue with the appeal, either because of the conflict raised by the competency claim, or his own lack of appellate experience. But the only thing he did was file a motion to withdraw as counsel in the District Court, an unhelpful motion since the District Court matter was already concluded. And Mr. Nesbitt did not even send this motion to his own client, a step considered necessary in any application for withdrawal as counsel.

Of even more serious import, when advised by the 9<sup>th</sup> Circuit that the failure to pay the fee could result in dismissal of his client's appeal, he did absolutely nothing. His only explanation was that he considered dismissal of the appeal as "preferable" to either handling the appeal or finding someone else to process the appeal "because I didn't want to do that". *ABA Standard 4.42* states that "Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. The "knowing" standard is clearly met from Respondent's own testimony. While the client's appeal was not dismissed, there was potential that it would happen, and in any event the appeal was delayed by at least seven months; a not inconsiderable portion of the 44 month sentence

Under *ABA Standard 4.5, Lack of Competence*, either 4.52 or 4.53 could be applicable. *Standard 4.52* states that: "Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client". Mr. Nesbitt stated that

he had never handled any appeal in any case. He should not have agreed to in Mr.

Romero's case, but once having done so, he was obligated to correct that error by securing competent counsel. Instead, he did nothing.

*Standard 4.53* states that: "Reprimand (Censure) is generally appropriate when a lawyer demonstrates failure to understand legal doctrines or procedures and causes injury or potential injury to a client". This was clearly the case with respect to Mr. Nesbitt's knowledge of Federal Criminal Appeal Procedures.

*ABA Standard 6.2, Abuse of the Legal Process*, applies to Mr. Nesbitt's contumacious treatment of the 9<sup>th</sup> Circuit Court of Appeals. *Standard 6.22* states that: "Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client, or causes interference or potential interference with a legal proceeding". Mr. Nesbitt clearly knew he was violating several repeated court orders, despite the willingness of the 9<sup>th</sup> Circuit to extend time and even provide him with forms and references to the appropriate Rules. He knew, as he stated, that his actions could jeopardize his client's appeal; and the appeals process was delayed over seven months, which is a substantial period of time even in the less than rapid appellate process.

*ABA Standard 7, Violations of Duties Owed as a Professional*; comes in to play through Respondent's failure to respond to requests for information from the state bar counsel. *Standard 7.4* states: "Admonition (Informal Reprimand) is generally appropriate when a lawyer engages in an isolated instance of negligence that is a

violation of a duty owed as a professional and causes little or no actual or potential injury to a client, the public or the legal system“. The failure to respond immediately to the letters did not prevent the state bar from proceeding with the case.

The general standard on factors to be considered in imposing sanctions is *Standard 3.0*, which states that the following should be considered:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating and mitigating factors.

Factors (a) and (c) have been considered above.

The mental state of the Respondent can best be summed up in one word; denial.

Even in his closing statement Mr. Nesbitt does not seem to grasp the import of what he did, or mostly failed to do, and his failure to live up to his obligations to his client and the Court. While he mentioned his case load, and some other serious cases; the amount of time necessary to establish contact with his client and with the court, and to set up the process of completing a forma pauperis appeal and transfer to the Federal Public Defender would have been minimal for a lawyer with 34 years of practice experience.

#### **AGGRAVATION AND MITIGATION**

The following is considered in aggravation. Standard 9.22(j): Substantial experience (34+ years) in the practice of law.

1 The following is considered in mitigation. Standard 9.32(a): Absence of a prior  
2 disciplinary record. Standard 9.32(b): Absence of a dishonest or selfish motive,  
3 other than the financial reason for not paying the court ordered sanction. Standard  
4 9.32(k): Imposition of other penalties or sanctions. This is based on Respondent's  
5 statement that he will pay the \$1000.00 sanction to the 9<sup>th</sup> Circuit. This payment will  
6 be part of the recommended terms of Probation.

### 7 PROPORTIONALITY REVIEW

8 The most recent case before the Commission involving both a delay in Court  
9 proceedings and failure to cooperate with bar counsel during the investigation is *In*  
10 *Re Alavez*, No. 08-0277. (2008) In that case a comparatively inexperienced attorney  
11 failed to appear at two court appearances for her client's sentencing, over a two week  
12 period prior to formally withdrawing as counsel. She was sanctioned \$100.00 by the  
13 trial court, a sum which was paid after some delay. Ms. Alavez never responded to  
14 the bar request for information and ultimately allowed a default by failing to answer  
15 the Complaint. This conduct was held sufficient to justify a suspension of six  
16 months and one day. There was no allegation or proof that the client was subjected  
17 to either actual or potential harm by the delay.

18 However, a review of other cases reveals an extreme *disproportional* between *Alavez*  
19 and other recent cases. In no cases has a six month and one day suspension been  
20 imposed absent a felony conviction, repeated client fund disbursement takings or  
21 repeated serious misconduct. There are no cases in Arizona Bar disciplinary history  
22

1 in which an attorney received a six months and one day suspension for missing two  
2 post trial court appearances and receiving a \$100.00 court sanction where the missed  
3 days in no way affected the client or the actual trial. The cases cited by the  
4 Commission in its Alavez ruling all show serious additional lapses beyond missed  
5 court appearances, and all resulted in disbarment. *In re Bower*, SB-07-0054-D  
6 (2007) involved a criminal misdemeanor conviction for harassment; failure to abide  
7 by the terms of his criminal probation; abandoning clients and apparently numerous  
8 court appearance failures, as well as sending harassing communications to counsel  
9 opposing his divorce case. *In re Beskind* SB-07-0156 (2007) involved numerous  
10 failures to perform services after accepting retainers from clients and repeated  
11 failures to attend court proceedings, as well as the failure to respond to the Bar's  
12 investigation. *In re Coe*, SB-06-0854 (2007) involved multiple counts of failure to  
13 appear at court hearings, provide adequate representation, abandonment of clients  
14 and practicing while under suspension. These are extreme cases involving failure to  
15 appear in court or respond to court orders, with prejudice to the clients' cases. See  
16 also *In re Schlievert*, SB-07-0034 (2007) in which there was a pattern of neglect of  
17 clients and failure to obey court orders. This resulted in an agreement for a six  
18 months and one day suspension.

19 Of more apt comparison are cases such as *In re Odneal* SB-06-0146 (2007) in which  
20 there was failure to attend two court appearances, and failure to obey court orders.  
21 No client prejudice was mentioned and no failure to cooperate with the investigation  
22

was charged. This resulted in a thirty day suspension with two years probation. See also *In re Levy* SB-07-0140 (2007) which involved “numerous” failures to comply with court orders, failure to promptly pay a court ordered sanction, and verbal expression of his lack of respect for the judge in a case. No client prejudice or failure to cooperate in the investigation was charged. This resulted also in a 30 day suspension. A closer factual analogy can be found in *In re Diodati* SB 07-0197 (2008) in which the attorney was found responsible for failing to diligently represent clients; failing to obey a court order regarding discovery and failing to cooperate with the bar investigation. He was also found to have violated the rules regarding proper maintenance of his clients trust account, although it does not appear that there was any actual loss or misappropriation of client’s funds. A two months suspension was imposed.

Ultimately, proportionality is a subjective decision, and impossible to attain with scientific precision. Discipline in each case must be tailored to the facts of the individual case. The State Bar, in its proposed agreement, simply chose to ignore the fact that the Respondent agreed to file an appeal on behalf of Mr. Romero. This meant more than simply filing a notice of appeal and walking away. Mr. Nesbitt was repeatedly reminded by the 9<sup>th</sup> Circuit that as counsel of record he had certain obligations to the Court and his client. He simply chose to ignore the court and his obligations, as he ignored the investigative process of the bar. Under the ABA Standards, as noted above, the presumed sanction is suspension.



It is also true that this is the first recorded blemish on a lengthy legal career. Mr. Nesbitt, while not expressing a true understanding of his failures, also appeared to have sincere regret, and the chances of a repeat violation are minimal. The disciplinary process has as its primary motive the protection of the public above that of punishment of the attorney. For all the reasons set forth in this document, the recommendation of a short period of suspension would appear to fulfill all the needs of the system.


### RECOMMENDATION

The following sanctions are recommended:

1. That the Respondent be suspended from the practice of law for a period of thirty days following the finality of the decision.
2. That the Respondent shall be placed on a period of probation for one year under the following terms and conditions:
  - A. The probation period shall commence at the time of the commencement of the suspension.
  - B. That the Respondent shall pay the \$1,00.00 sanction in Cause No. 07-10505 to the 9<sup>th</sup> Circuit Court of Appeals on or before April 1, 2009.
  - C. Respondent shall participate in a one time meeting/evaluation by the State Bar's Member Assistance Program and cooperate with any recommendation made by the program.

1 D. Respondent shall pay the costs and expenses incurred in these  
2 disciplinary proceedings within 30 days of the conclusion thereof.  
3

4 Dated this 10<sup>th</sup> day of February, 2009

5  
6   
7 Philip M. Haggerty  
8 Hearing Officer 6K

9 Original filed with the Disciplinary  
10 Clerk this 10<sup>th</sup> day of February, 2009:

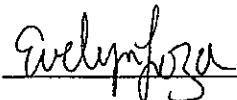
11 and

12 Copies mailed this 11<sup>th</sup> day of February  
13 2009, to:

14 Edward E. Nesbitt  
15 Respondent in propria persona  
16 177 North Church, Suite 200  
Tucson, AZ 85701-1117

17 and

18 Stephen P. Little\  
19 Staff Bar Counsel  
20 State Bar of Arizona  
4201 North 24<sup>th</sup> Street  
Phoenix, AZ 86016-7386

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22   
23